United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

75-6068

PETITION

75-4164

APPEAL

75-6068

B

United States Court of Appeals

FOR THE SECOND CIRCUIT

SUN ENTERPRISES, LTD., SOUTHERN NEW YORK FISH AND GAME ASSOCIATION, INC., LYMAN E. KIPP, RICHARD E. HOMAN, NO BOTTOM MARSH and BROWN BROOK,

Plaintiffs-Appellants,

—against—

RUSSELL E. TRAIN, *et al.*
["Federal Defendants"],

Defendants-Appellees, and

HERITAGE HILLS OF WESTCHESTER, *et al.*
["Private Defendants"],

Intervenors.

P/S

SUN ENTERPRISES, LTD., SOUTHERN NEW YORK FISH AND GAME ASSOCIATION, INC., LYMAN E. KIPP, RICHARD E. HOMAN, NO BOTTOM MARSH and BROWN BROOK,

—against—

Petitioners,

ADMINISTRATOR OF THE U. S. ENVIRONMENTAL PROTECTION AGENCY, RUSSELL E. TRAIN,

Respondent, and

HERITAGE HILLS OF WESTCHESTER, *et al.*

Intervenors.

APPEAL FROM THE U.S. DISTRICT COURT FOR THE SOUTH... DISTRICT OF NEW YORK

PETITION TO REVIEW ORDER OF U.S. ENVIRONMENTAL PROTECTION AGENCY

BRIEF FOR *AMICUS CURIAE*

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INTEREST OF AMICUS

Amicus Natural Resources Defense Council, Inc., ("NRDC"), a New York not-for-profit corporation authorized to practice law in the State of New York, is a national environmental organization with a membership composed of scientists, lawyers, educators, and citizens dedicated to the defense and preservation of the human environment and the natural resources of the United States. NRDC has approximately 18,000 members and contributors. NRDC and its members have direct interest in the proper enforcement of the federal laws governing water pollution and the protection of fish and wildlife. Harlem Valley Transportation Ass'n., NRDC, et al. v. Stafford, 360 F. Supp. 1057 (S.D.N.Y. 1973).

INTRODUCTORY STATEMENT AND FACTS

This amicus brief addresses the issue of how the Department of the Interior and the Environmental Protection Agency ("EPA") are to discharge their responsibilities under the Fish and Wildlife Coordination Act, 16 U.S.C. §661 et seq., ("Coordination Act"). The Coordination Act requires that, whenever a stream or other body of water is to be "controlled or modified for any purpose whatever . . . by any public or private agency under Federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service, Department of the Interior, . . . with a view to the conservation of wildlife resources by preventing loss of and damage to such resources . . ." 16 U.S.C. §662(a). The form of such reports is spelled out in the statute as well as the requirement that the receiving agency "shall give full consideration to the report and recommendations of the Secretary of the Interior . . . and the project plan shall include such justifiable means and measures for wildlife purposes as the reporting agency finds should be adopted to obtain maximum overall project benefits." 16 U.S.C. §662(b).

Under the terms of the statute, the Department of the Interior must review and consult with agencies issuing permits for the modification of water bodies and the consulting agency must give consideration to Interior's suggestions. In the instant case, EPA issued a draft permit for the modification of a water body, but the Department of the Interior completely failed to undertake any consultation with EPA. Interior informed EPA that "no action" by Interior "due to present lack of personnel" was contemplated and that "no report" would be made "in accordance with the provisions of the Fish and Wildlife Coordination Act." Appellant's Appendix at A17. EPA preceded nevertheless to issue the permit.

ARGUMENT

THE FAILURE OF EPA AND THE DEPARTMENT OF THE INTERIOR TO CONSULT FOR THE PURPOSE OF CONSERVING WILDLIFE RESOURCES WAS ARBITRARY, CAPRICIOUS, AND IN DIRECT VIOLATION OF THE FISH AND WILDLIFE COORDINATION ACT.

This case raises the issue of an agency's arbitrary performance of its Congressional mandate. Congress declared that prior to certain actions, a federal agency must first consult with the Department of Interior for the protection of fish and wildlife. Congress fully expected that such consultation would lead to rational decision-making designed to protect important resources. Instead we are here presented with capricious and arbitrary agency action.

The Department of Interior and EPA starkly set the issue: they would not do what Congress expected, because of a claimed lack of manpower. However commendable such candor is, the net result is identical to the agency simply rubber-stamping each application "approved". In that event, a court

would quickly find that the agency failed to perform its duty, there being neither record, factual analysis, nor rational basis for action.

Frankly arbitrary decisions are no more commendable than hidden, devious arbitrary decisions. In both cases the court's role remains the same; it must call the agency to task and hold it to a standard of reason and rationality.

In one of the leading cases under NEPA the District of Columbia Circuit Court laid out the proper approach for the judiciary when faced with a fact pattern similar to that disclosed here. In answer to claims of difficulty and transitional problems, the Circuit Court wrote the following:

> "These cases are only the beginning of what promises to become a flood of new litigation -- litigation seeking judicial assistance in protecting our natural environment. Several recently enacted statutes attest to the commitment of the Government to control, at long last, the destructive engine of material 'progress'. But it remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role ... . Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast halllways of the Federal bureaucracy." Calvert Cliffs Coord. Com. v. AEC., 449 F.2d 1109, 1111 (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972).

A. The Review and Consultation Procedures of the Coordination Act are Mandatory, Yet Were Here Ignored.

The rationale of the Coordination Act is a straightforward one. Fish and wildlife have always been considered a form of common property which the state holds in trust and administers for the benefit of its citizens. Geer v. Connecticut, 161 U.S. 519 (1896). Numerous federal agencies directly undertake projects which alter waterways and wetlands or, like EPA, license private parties to modify waterways and wetlands. Any of these activities may have an adverse impact on fish and wildlife. In many cases, proper planning or controls will mitigate or avoid such adverse impacts.

Congress has determined that in the process of waterway use and development, our important and productive fish and wildlife resources are to receive equal consideration with the other factors weighed by federal agencies. 16 U.S.C. §661. The mechanism for assuring that this takes place is the consultation and recommendation process of the Coordination Act.

The Coordination Act in this case required consultation between EPA and the Department of the Interior before

EPA issued a discharge permit under the 1972 Federal Water Pollution Control Act Amendments ("FWPCAA"), 33 U.S.C. §1251 et seq. The Coordination Act states that whenever any stream or other body of water is to be

> controlled or modified for any purpose whatever . . . by any public or private agency under Federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service, Department of the Interior . . . with a view to the conservation of wildlife resources . . . 16 U.S.C. §662(b).

EPA's permitting activity meets the terms of the statute and consultation is required. Senate Committee on Public Works, A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. 331-332, 651 (Jan. 1973) (Comm. Print) (2 vols.); see argument set forth in Brief of Sun Enterprises at 37-38.

It is particularly important that this consulting responsibility be fulfilled in relation to the FWPCAA for two reasons. First the FWPCAA sets as one of its major goals the protection of fish and wildlife resources. 33 U.S.C. §1251(a). Second, the FWPCAA exempts permits for existing sources from the NEPA review, 33 U.S.C. §1371(c)(1). In these circumstances, the determination of Congress to retain

review under the Coordination Act is underscored, and the importance of this review becomes more important than it might be in a situation where NEPA review by other agencies might cover some of the same ground.

The Coordination Act clearly requires that consultation take place. The Act speaks in mandatory terms: the federal agency issuing a permit first "shall consult" with the Fish and Wildlife Service. And the recommendations of the Service are to be given full consideration.

The courts which have reviewed the terms of the Act have come to the straightforward conclusion that the Act means what it says. In Udall v. FPC, 387 U.S. 428, 443-444 (1967), the Supreme Court set out the national policy embodied in the Coordination Act and its consulting requirement and concluded: "Certainly the wildlife conservation aspect of the proje[illegible]ust be explored and evaluated," (emphasis added). This holding was followed in Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971). The need for strict compliance with the Coordination Act was again emphasized by the Court of Appeals for the Eighth Circuit in Environmental Defense Fund v. Froehlke, 473 F.2d 346, 356 (8th Cir. 1972) as a legislatively determined guard against

adverse effects on fish and wildlife. Accord, Akers v. Resor, 339 F. Supp. 1375 (W.D. Tenn. 1972), where the court once again underlined the mandatory nature of the Coordination Act.

The Department of the Interior and EPA have taken a different view of their responsibilities under the Coordination Act. Choosing to disregard its terms, legislative history and judicial support, Interior decided that with regard to this group of 80 permit applications, it would take "no action" and prepare "no report . . . in accordance with the Fish and Wildlife Coordination Act." Appellants Appendix at A17. EPA then issued the permit even though the prerequisite coordination had not taken place.

B. Interior's Decision to Take "no action" at all to Review or Consult about a Project which Threatens Critical Wetlands Habitat, and EPA's Decision to Issue the Permit Despite the Lack of Consultation, Constitute Unlawful Conduct, the Arbitrary Nature of Which is Underscored by the Availability of Reasonable Means for Even Limited Personnel to Comply with the Coordination Act and Implement its Protective Purpose.

If Interior made no review of these eighty applications, then by the terms of the Coordination Act EPA could not issue permits. Yet the federal government held other options which if taken would have allowed the NPDES permit

system to proceed and still have satisfied the requirements of the Coordination Act.

If in fact there was a current lack of personnel able to conduct an in-depth review of each NPDES permit application, then the federal defendants were bound by law to do one of two things: either pause until adequate personnel had been internally reassigned or newly hired; or use existing personnel to review each application but to a flexible degree. Neither of these two alternatives consistent with the Act was chosen.

The first alternative would have entailed denying the permit application or holding it in abeyance until a review process consistent with statutory mandate was in operation. Aside from the incentive which such a pause would supply for the allocation or reallocation of the needed resources, it is an approach supported by cases under the 1899 Refuse Act, which hold that permission to discharge refuse into navigable waters may be denied even though a regulatory permit program authorized by statute is not yet in existence. United States v. Pennsylvania Industrial Chem. Corp., 411 U.S. 655 (1973); United States v. U.S. Steel Corp., 482 F.2d 439, cert. denied, 414 U.S. 909 (1973). Similarly

in the present case, permission to discharge pollutants could properly have been denied until a legally adequate permit program had been established.

The other and more reasonable alternative -- a flexible review process -- would have meant that each permit application was initially assessed to determine its likelihood of harm to fish and wildlife. A project which appeared likely to impair these resources would then have been subjected to an in-depth analysis, whereas projects with less significant impact would have received a more summary review. In this manner, each permit application could have been reviewed by rational criteria based upon the purposes of the Act.

This approach was in fact set forth by Interior one month after EPA acted in this case, in proposed regulations to provide interim guidance to the Fish and Wildlife Service pending the promulgation of final regulations. Under these regulations a screening process was established to identify the projects which warranted particularly scrutiny.

> All public notices of applications for permits received from . . . EPA . . . are then screened to exclude from further consideration those where the proposal obviously will have no impact or at most an inconsequential impact on fish and wildlife resources. Sec. 3.1(B). 39 Fed. Reg. 29555 (Aug. 15, 1974).

A determination of "no impact" or "inconsequential impact" was to be reached only after several elements had been weighed, including:

> The apparent environmental significance -- what resources would be affected and how seriously? Is the impact of the proposal significant in view of its anticipated direct and secondary effects and in light of existing or potential cumulative effects of similar or other developments affecting the same resources? Sec. 3.1(B)(1)(b), 39 Fed. Reg. 29555.

Interior's failure to follow such a reasoned process of review in the instant case appears all the more unjustifiable, for had the permit application been examined by these criteria, its significant impact on resources almost certainly would have been identified, leading to an in-depth review and then consultation with EPA, including an exploration of design modifications and alternative sites which would avoid harm to the wetlands.

This result seems particularly evident in light of the special concern about wetlands which Interior demonstrated in the proposed regulations.

> It is the [Fish and Wildlife] Service position that there exists a national recognition that wetland and shallow water habitat have such high ecological and social values as to admit of their destruction or degradation only where there is no question that the public interest demands it. Sec. 4.1(B)(2), 39 Fed. Reg. 29556.

Extensive documentation and references in support of the special importance of wetlands was appended to the regulations, documenting their role as a vital link in the food chain and as critical habitat for fish and wildlife, and underscoring their sensitivity to changes in adjacent areas. With this special concern, a strong policy against approval of projects that would alter wetlands was set forth:

> For nonwater-dependent works ... the Service usually recommends denial of a permit ... Sec. 2.2(B)(1)(a), 39 Fed. Reg. 29555.
>
> For water-dependent works, the Service discourages the occupation and destruction of biologically productive wetlands and shallows. Sec. 2.2(B)(1)(b), Id.

These regulations were proposed nearly eight years after enactment of the Fish and Wildlife Coordination Act. As a result of this inordinate delay, the regulations did not apply to consideration of a project which will seriously impair fish and wildlife by the eutrophication of surface waters in the wetlands and the contamination of a critical underground aquifer as well. Instead the permit was arbitrarily lumped with other applications into a "no action" category, not because it lacked importance to fish and wildlife, but because it happened to fall within a lot

of 80 permits swept aside to reduce workload. Such inaction cannot "reasonably be said to fall within the range" of discretion that is consistent with the Act's language and purpose. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 - 417 (1971).

This approach, moreover, is also arbitrary in another sense· the public had no opportunity to comment on its wisdom or to suggest alternatives. This contrasts with the opportunity presented by the regulations later proposed by Interior. This opportunity is part of a larger process of administrative accountability to the public which the Administrative Procedure Act sought to guarantee, but which Interior evaded in the instant case, including by its failure to carry out the "critical task" of developing clear and rational standards to be applied in the review process. Wellford v. Ruckelshaus, 439 F.2d 598, 603 (D.C. Cir. 1971); see, Davis, Administrative Law Text, §6.05 (1972); Atchison, T. & S. F. Ry. Co. v. Witchita Bd. of Trade, 412 U.S. 800, 807 (1973).

C. Any "lack of personnel" was due to the Executive Branch's Own Policy not to Seek Funding for Adequate Personnel and May Not be Used to Justify this Attempt by the Executive to Nullify an Important Legislative Mandate.

The federal defendants seek to justify this Interior practice of ignoring job lots of EPA permits on the ground

that there were simply too many permits to consider. Brief of EPA and Interior at 31. This defense has been tried out with other environmentally protective statutes and has failed. It must be rejected here as well. It is not the place of an administrative agency to repeal by its conduct the statutory mandate given it by Congress. Calvert Cliffs' Coord. Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971).

The attempt to use lack of personnel as a justification for "no action" seems especially weak in that the "lack of personnel" was the result of the executive branch's own policy not to seek funding for adequate personnel. Throughout the Coordination Act Hearings on which the federal defendants rely to show the heavy workload which has fallen on Interior, it becomes apparent that Interior was not requesting the funds which a GAO Report and other analyses show it needs in order to carry out its work under the Act effectively. For instance, Congressman Reuss pointed out that

his committee "recommended that Interior seek adequate funds from Congress to carry out its Coordination Act duties effectively and timely." Hearings Before the Subcommittee on Fish and Wildlife Conservation and the Environment of the Committee on Merchant Marine and Fisheries, 93d Cong., 2d Sess. (Ser. No. 93-33) at 121.

Interior did not request the personnel it needed. The GAO Report on the administration of the Act estimated that an additional 408 positions were needed in the program. Interior agreed, but requested positions and funding for only about half that number. Letter of Douglas P. Wheeler, Deputy Assistant Secretary of the Interior to Congressman Dingell, Id. at 601.

Thus even in the budgetary process, we have a form of administrative repeal of the statute being carried on. The executive branch appears to have decided not to follow the mandate of the Coordination Act fully and thus through low budget and personnel requests has created a situation in which it can claim that compliance with the Act is beyond its capacities. It amounts to little more than an attempt by the executive branch to usurp the place of Congress.

The courts look on such attempts with increasing disfavor. In response to legal action brought by environmental groups chagrined at Interior's consistently inadequate budget requests, the Department has this year been ordered to prepare an environmental impact statement on its budget request for the National Wildlife Refuge System, Sierra Club v. Morton, 8 ERC 1009 (D.D.C. 1975), and to request funding at a level adequate to carry out a statutory mandate, Sierra Club v. Dep't of Interior, 8 ERC 1013 (N.D. Cal. 1975). Where the executive branch uses fiscal techniques to frustrate legislative mandates, a constitutional issue is raised concerning the proper separation of powers between the executive and legislative branches. Campaign Clean Water, Inc. v. Train, 489 F.2d 492, 498 (4th Cir. 1974). Executive nullification of the law is not favored by the judiciary. United States v. Nixon, 418 U.S. 683 (1974). The court should not allow or condone this attempt to set at nothing the clear instructions of the Congress for the protection of fish and wildlife. Not even the most summary review to distinguish significant permits from minor ones was made in the instant case. This is not a rational path to wildlife conservation.

CONCLUSION AND RELIEF

For the above reasons, amicus NRDC urges that actual consultation between EPA and the Department of the Interior be required on the permit in dispute, in accordance with the Fish and Wildlife Coordination Act. The District Court's decision denying plaintiffs' motion for summary judgment on their second claim for relief and granting summary judgment for the defendants should be reversed.

Respectfully submitted,

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Dated: New York, New York
December 5, 1975

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion and Brief of Amicus Curiae was served upon the following parties by hand delivery this 5th day of December, 1975:

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